IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-6525

SAMUEL HALL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that the Ohio Supreme Court has decided the federal question at issue in accord with the applicable decisions of this court concerning the imposition of the death penalty.

OPINIONS BELOW

The Petition of the petitioners correctly cites the opinions below. (Appendix B).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

II. Whether the mitigating circumstances set forth in Section 2929.04 (B) of the Ohio Revised Code, which closely parallel the mitigating factors previously reviewed by this Court and which provide for consideration of the nature and circumstances of the offense and the history, character and condition of the offender, are violative of any constitutional rights.

III. Whether requiring the defendant, once his guilt has been established beyond a reasonable doubt, from going forward with evidence which would establish by a preponderance one of the statutorily defined mitigating circumstances, violates the Due Process and Equal Protection Clauses of the United States Constitution.

IV. Whether Ohio's system of appellate review violates due process where a court of statewide jurisdiction reviews each capital case to insure that there is substantial evidence to support verdicts of guilt as to the crime charged and the specification and the finding that the evidence failed to establish a mitigating circumstance.

V. Whether Ohio's statutory scheme which provides for election of trial by a three-judge panel in a capital case is unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2903.01, 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code, are set forth in Appendix A herein.

STATEMENT OF THE CASE

On October 16, 1974 as Julius Graber was parking his Chevrolet Malibu in the garage of his apartment building Petitioner Hall and one Willie Lee Bell kidnapped him at gunpoint. Mr. Graber was forced to lie in the trunk of his own vehicle while he was driven first by Petitioner and then by Bell to an isolated lane which went into a wooded area of Spring Grove Cemetery.

Bell backed Graber's car down the lane with the headlights turned off. Once they exited from the car Bell asked Petitioner what they were going to do. They removed Mr. Graber from the trunk and led him at gunpoint into the woods.

Robert Pierce, who lived in an adjacent apartment building, heard Mr. Graber plead, "Don't shoot me. Don't shoot me". Then he heard a shot followed by a short interval of time, and then he heard a second shotgun blast. Mr. Pierce continued to watch the cemetery as Petitioner entered the Graber vehicle from the passenger's side and moved over to the driver's seat. The car then approached the roadway without any headlights on, turned onto the highway, and went down the highway into the night.

The police were notified immediately. They responded to the scene of the shooting within minutes. Mr. Graber

had sustained a shotgun blast to the rear of his head but the officers detected some life signs so the emergency squad was summoned. By the time the emergency squad transported Mr. Graber to Cincinnati General Hospital he had expired.

Later at the morgue the officers discovered that Mr. Graber had attempted to secret valuables such as his ring, money, and keys in his pockets and shoes. In the opinion of the Coroner the fatal shot to the rear of Mr. Graber's head was fired at contact range with Mr. Graber's hands being clasped behind his head at the time of the shooting.

After the shooting the Petitioner and Willie Lee Bell drove to Dayton, Ohio in their victim's automobile. The next morning they commandeered Kenneth Hardin, a gasoline station attendant, into the trunk of his automobile at gunpoint. Fortunately, a State Highway Patrolman stopped Petitioner who was driving Hardin's car for a faulty muffler on the vehicle. As a result of this confrontation the sawed-off shotgun, which was used in killing Julius Graber, was recovered from the front seat of the Hardin vehicle which Petitioner had been driving. Seeing the police stop the Petitioner caused Willie Lee Bell to stop, ask for directions, and drive back to Cincinnati in Graber's vehicle.

On October 22, 1974, detectives from the Cincinnati Police Department interviewed the Petitioner at the Montgomery County, Ohio jail. After advising the Petitioner of his constitutional rights the Petitioner gave a tape recorded statement. The following day two different detectives from the Cincinnati Police Department interviewed the Petitioner for the second time. At that time the Petitioner gave a second tape recorded statement which detailed his involvement in the kidnapping, aggravated robbery and aggravated murder of Julius Graber. Al-

though the Petitioner denied being the triggerman he completely admitted his participation in the crimes.

Petitioner Hall and Willie Lee Bell were jointly indicted by the Grand Jury of Hamilton County, Ohio, on November 22, 1974, for the counts of aggravated murder with specifications, one count of kidnapping and one count of aggravated robbery. Petitioner Hall and Willie Lee Bell were tried separately, each to a three-judge panel from the Court of Common Pleas for Hamilton County, Ohio.

On January 14, 1975, the cause proceeded to trial. The Court concluded after hearing all the evidence that Petitioner was guilty of aggravated murder while committing kidnapping, aggravated robbery, and kidnapping.

Pre-sentence and psychiatric examinations were ordered pursuant to the Ohio Statutes prior to the imposition of sentence. The mitigation hearing conducted on March 7, 1975, resulted in the trial court finding that the evidence established none of the mitigating circumstances by a preponderance. In accordance with the Ohio statutory scheme the Petitioner was then sentenced to death.

The conviction and sentence were affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio, on April 12, 1976. The Supreme Court of Ohio affirmed the conviction and sentence on December 23, 1976. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on January 14, 1977.

ARGUMENT

I.

Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

The primary issue presented by Petitioner is whether Ohio's statutory scheme, which imposes the death penalty, passes constitutional muster in light of this Court's most recent pronouncements on capital punishment as they relate to the Eighth Amendment. Respondent submits that the Ohio laws conform with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

Following the decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Ohio legislature enacted Section 2929.02, Ohio Revised Code (Appendix A), which prescribes the death penalty or life imprisonment for the crime of aggravated murder. Sections 2929.03 and 2929.04, Ohio Revised Code, (Appendix A) set forth the procedure for determining whether the death sentence is to be imposed. Aggravated murder is limited to purposeful killing as defined by Section 2903.01, Ohio Revised Code (Appendix A).

Those statutes permit the death penalty only where one or more aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The aggravating factors include: assassination of the President, Vice-President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such

office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

Under the Ohio statutory scheme the trier of fact may be either a jury or, if waived, a three-judge panel. First the trier of fact is to consider whether the defendant is guilty of the charge, and if found guilty, whether he is also guilty of one or more of the specifications in the indictment.

If the defendant is found guilty of the charge and innocent of the specification, a sentence of life imprisonment is imposed. If the defendant is found guilty of the charge and guilty of one or more of the specification, a separate hearing is held before the trial judge or three-judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty.

A pre-sentence investigation and a psychiatric examination of the defendant are required to be made before the hearing. Copies of these reports are furnished to the prosecutor and to the defendant or his counsel. Other evidence and testimony may be submitted at the mitigation hearing, including any statement, sworn or unsworn by the defendant. The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three mitigating factors have been established to exist by a preponderance of the evidence.

In considering whether one of the mitigating circumstances has been established by a perponderance of the evidence the sentencing authority is to consider the nature and circumstances of the offense and the history, character, and condition of the defendant.

Thus, Ohio's statutes provide for a bifurcated trial, in which the issues of guilt, as to the charge and of certain

statutorily defined aggravating circumstances, are determined by the jury or, if waived, by a three-judge panel, and the issues of mitigation and sentence are determined by the trial judge or by the three-judge panel.

The defendant has a direct right of appeal of his conviction and sentence pursuant to Rule 4 (B), Ohio Rules of Appellate Procedure (Appendix C). Appeals by leave are governed by Rule 5, Ohio Rules of Appellate Procedure (Appendix C). In accordance with Rule 12 (A), Ohio Rules of Appellate Procedure (Appendix C), the Court of Appeals shall rule on all assignments of error briefed by the Appellant. If the sentence of death is affirmed by a Court of Appeals, a further appeal as a matter of right may be taken to the Supreme Court of Ohio, as provided by Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution (Appendix C).

Ohio's statutory scheme differs somewhat from any of these considered by this Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which this Court found to be constitutional. The Ohio statutory scheme insures that the sentencing authority is apprised of information relevant to the imposition of the death sentence and provided with standards to guide its use of the information. Guided by this information and applicable standards the sentencing authority is directed to give attention to the nature or circumstances of the crime committed and to the character or record of the defendant. Thus, Ohio's statutory scheme provides a framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

II.

Whether the mitigating circumstances set forth in Section 2929.04 (B) of the Ohio Revised Code, which closely parallel the mitigating factors previously reviewed by this Court and which provide for consideration of the nature and circumstances of the offense and the history, character and condition of the offender, are violative of any constitutional rights.

It is submitted that the mitigating circumstances enumerated in Section 2929.04 (B), Ohio Revised Code pass constitutional muster. These standards, although limited to three, echo the language found in the Model Penal Code, (Section 210.6 (4) (c) (f) (g)), and Florida Statutes (Section 921.141 (6) (b) (c) (e) (f)). "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit", *Proffitt* v. *Florida*, — U.S. —, 96 S. Ct. 2960, 2969 (1976). As the Court pointed out the requirements of *Furman* are satisfied, "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty", — U.S. —, 96 S. Ct. at 2969. Clearly, Ohio's statutory scheme satisfies this requirement.

The mitigating circumstances must also be considered as they have been construed by the Supreme Court of Ohio. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed by the sentencing authority, *State* v. *Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods*, 48 Ohio St. 2d 127, 133-

138 (1976); and *State* v. *Osborne,* 49 Ohio St. 2d 135, 145-147 (1976). Through the state appellate procedure each of the mitigating circumstances in Section 2929.04 (B) has undergone close judicial scrutiny.

The mitigating circumstances in Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty.

III.

Whether requiring the defendant, once his guilt has been established beyond a reasonable doubt, from going forward with evidence which would establish by a preponderance one of the statutorily defined mitigating circumstances, violates the Due Process and Equal Protection Clauses of the United States Constitution.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defenses which the defense must bear the burden of going forward with evidence in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights, *State* v. *Lockett,* 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975), and *In re Winship,* 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove *guilt* beyond a reasonable doubt. Ohio's statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon,* 343 U.S. 790 (1952).

Although this Court has pointed out that the jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois,* 351 U.S. 510, 519 n. 15 (1968), it has never suggested that jury sentencing is constitutionally required, *Proffitt* v. *Florida,* —— U.S. ——, 96 S. Ct. 2960, 2966 (1976).

Pursuant to the Ohio statutory scheme the trial judge or three-judge panel is the sentencing authority depending on whether or not the defendant waives a trial by jury. It is submitted that this system of judicial sentencing enhances the constitutionality of the Ohio statutory scheme in so far as it should lead to even greater consistency in the imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman* v. *Georgia,* supra, the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State* v. *Ferguson,* 175 Ohio St. 390, 396 (1964), *State* v. *Frohner,* 150 Ohio St. 53 (1948). As was mentioned earlier this Court held that Ohio's pre-*Furman* statutory

scheme was constitutional in *McGautha* v. *California,* 402 U.S. 183 (1971). It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

Petitioner's contention that due to his economic condition he was denied equal protection of the law is misplaced. Section 2929.03 (D) of the Ohio Revised Code provides that pre-sentence investigation reports and the psychiatric examination reports should be submitted to the trial court in accordance with Section 2947.06 of the Revised Code (Appendix A).

Section 2947.06 of the Ohio Revised Code provides that the trial court may appoint not more than two psychologists or psychiatrists who shall make reports concerning the defendant as the court requires for the purpose of determining the disposition of the case. The Supreme Court of Ohio has held that Section 2947.06 statutorily limits a defendant to only two witnesses who are either psychologists or psychiatrists, *State* v. *Royster,* 48 Ohio St. 2d 381, 390-391 (1976).

The provisions of Section 2947.06 notwithstanding four psychiatrists or psychologists examined the Petitioner in the present case. The Petitioner makes no complaint of incompetency, bias or prejudice on the part of the court appointees. His only complaint is that expert testimony is costly.

It is submitted that Petitioner's rights to equal protection under the law and due process were not denied or abridged.

IV.

Whether Ohio's system of appellate review violates due process where a court of statewide jurisdiction reviews each capital case to insure that there is substantial evidence to support verdicts of guilt as to the crime charged and the specification and the finding that the evidence failed to establish a mitigating circumstance.

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure and Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the evenhanded, rational and consistent imposition of the death sentences under law. *Jurek* v. *Texas,* — U.S. —, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller,* 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless,* 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne,* 49 Ohio St. 2d 135, 146 (1976), "The Ohio statutes require the death sentence

to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioner's assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State* v. *Edwards,* 49 Ohio St. 2d 31, 47 (1976), the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered, whether it be the verdict on the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

V.

Whether Ohio's statutory scheme which provides for election of trial by a three-judge panel in a capital case is an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Petitioner voluntarily, intelligently and knowingly waived a trial by jury and elected to be tried by a three-judge panel. At no time did Petitioner or his counsel assert that his Sixth Amendment right to trial by jury was being "chilled" by Ohio's statutory scheme which provides that a three-judge panel must unanimously find an absence of mitigating circumstances.

Unlike the statute in *United States* v. *Jackson,* 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument of coercion on a "numbers" game. That is, it is easier to convice one of the three-judge panel a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convince is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty of an aggravating circumstance. Without unamimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the

right and other considerations which include toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel. That is what occurred in this case. Petitioner has detailed these considerations, which include the fact that there was no defense of alibi or self-defense, there was a confession which was not suppressed, and there were indications from pre-trial psychiatric reports that an insanity defense would not prevail. It is submitted it was these considerations that were the basis for the jury waiver.

Mr. Justice Harlan observed in *McGautha* v. *California,* supra, that, "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose", 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

Furthermore, actual experience in Hamilton County, Ohio, demonstrates that the Ohio Statutory scheme does not coerce a defendant into waiving his constitutional rights. Of the fifteen capital cases tried in Hamilton County, Ohio, at the time the Supreme Court of Ohio reviewed Petitioner's appeal ten were tried to juries, four were heard by three-judge panels, and one was disposed of by way of appeal. These figures, which have never been disputed by Petitioner, suggest the total absence of any substantial coercion or statutory tilt toward inducing jury waivers. To the contrary, the figures suggest that the balance is on the side of twelve jurors determining the issue of guilt.

CONCLUSION

In summary, it is respectfully submitted that the Court should deny a writ of certiorari in this case. The Supreme Court of Ohio correctly decided the issues with respect to the constitutionality of Ohio's statutory scheme which allows for the imposition of the death penalty. This Court's decisions of July 2, 1976, concerning the death penalty were considered and correctly applied by the Supreme Court of Ohio. Accordingly, Respondent respectfully asks this Court to deny the writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A

STATUTES AND CONSTITUTIONAL PROVISIONS

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which

may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three

judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

§ 2947.06 Testimony after verdict to mitigate penalty; reports confidential

The trial court may hear testimony of mitigation of a sentence at the term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. The court of its own motion may direct the department of probation of the county wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.

The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for the purpose of determining the disposition of the case. Each such psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. Such reports shall be made in writing, in open court, in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each such report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein.

CONSTITUTION OF THE UNITED STATES

* * *

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * *

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * *

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX B

OPINIONS BELOW

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON, COUNTY, OHIO

No. C-75171

STATE OF OHIO
Plaintiff-Appellee,

vs.

SAMUEL HALL,
Defendant-Appellant.

OPINION

(Filed April 12, 1976)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr. and Bruce S. Garry, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Clayton E. Shea, 1632 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, J.

The defendant-appellant was jointly indicted with one Willie Lee Bell on two counts of aggravated murder contrary to R. C. 2903.01 with specifications of aggravated

robbery and of kidnapping, and on separate counts of aggravated robbery and of kidnapping. Counsel was assigned to the indigent Hall, and pleas of not guilty and not guilty by reason of insanity were entered. A jury trial was waived, and the case was tried, separately from that of Bell, by a three judge panel which, after determining Hall to be sane and competent to stand trial, found him guilty as charged in the second count and second specification, i.e., of aggravated murder and of aggravated murder while committing kidnapping, and of the third and fourth counts of aggravated robbery and kidnapping. Subsequently, following the penalty trial, the court found that none of the mitigating circumstances specified in R. C. 2929.04 (B) had been established by a preponderance of the evidence, and entered sentence against Hall, including the sentence of death by electrocution. It is from this judgment and sentence that appeal was timely filed.

Three assignments of error are presented for review, the third of which is phrased as follows:

> The provisions of Sections 2903.01, 2929.03 and 2929.-04, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

This assignment is sustained in large part by arguments heretofore reviewed at considerable length in the cases of *State* v. *Reaves,* No. C-75022 (1st Dist. January 26, 1976) and *State* v. *Woods,* No. C-75047 (1st Dist. January 26, 1976), and in the companion to the instant appeal, released this day, *State* v. *Bell,* No. C-75068 (1st Dist. April 12, 1976). We consider it unnecessary to review in detail our prior responses to those same arguments raised in this assignment of error, but reaffirm our determinations therein and adopt them here. It need only be added to what has

been heretofore said, that we have reviewed at length appellant's particular argument addressed to the alleged constitutional insufficiencies of the "mitigating" language of R. C. 2929.04 (B) , especially the use of the term "mental deficiency," and have concluded that the term is not so imprecise or unclear as to rob the section of that degree of certainty requisite to sustain its validity, or to permit, as appellant argues, a possible discriminatory use.

Thus, a certain amount of imprecision in vocabulary is probably inherent and unavoidable in dealing with matters relating to an incompletely developed science where, as in psychiatry and psychology, the experts continue to explore the parameters of their disciplines. The charge that appellant levels against the use of the term "mental deficiency" might, for example, be as readily used against the concepts or definitions of "sanity," or "competence" to stand trial; but it would be unthinkable, in our judgment, to abandon the effort to deal justly with these real problems simply because they require us to explore territories as yet incompletely mapped. Certainly no fair-minded person can quarrel with the legislative determination that an act which would otherwise require a death penalty should be mitigated where evidence preponderates that the offense was primarily the product or result of the offender's psychosis or mental deficiency; and where, as here, the experts to whom the courts must necessarily look for guidance in this extralegal field themselves evince no doubt or confusion with respect to the concept within which their responses are framed, the courts need not go beyond the record to search for one themselves.

Appellant's third assignment of error is overruled.

The first two assignments of error raise matters arising during the course of trial, and require us to observe, preliminarily, that the evidence here adduced at trial was, in

almost every material respect save one, that which has been reviewed at length in our opinion dealing with the appeal of Willie Lee Bell, supra. The significant variant is that in place of the statement of Bell, casting Hall in the role of planner and executioner, the instant trial contained the statement of Hall placing Bell in that leading role of mastermind of the robbery and kidnapping, and executant of the shooting of Graber. Rather than repeating the details of the events, we may therefore, and with the exception noted above, refer to our opinion in *State* v. *Bell* for the facts of the case.

The first assignment of error is phrased as follows:

> The court erred in admitting a written waiver of rights form which was not furnished to defense counsel under the Ohio Rules of Criminal Procedure.

This assignment proceeds from the following circumstance: after Hall's arrest by the state highway patrol in Dayton and the escape from the trunk of that car of the abducted gas station attendant, Hall was subjected to interrogation on several occasions by officers of several police forces. On October 22 and 23, 1974, Hall was interrogated by officers of the Cincinnati Department and was, in connection therewith, given both verbally and in writing the standard *Miranda* warnings; pursuant thereto he executed printed waiver-of-rights forms. These forms were furnished to Hall's counsel in accordance with discovery procedures. On the second of the two interrogations Hall inculpated himself in the kidnapping and armed robbery of Graber, but denied active participation in the slaying which, as noted above, he attributed to Bell. On October 28, 1974, Hall was interrogated by an officer of the Columbus Department concerning an unrelated matter, and it is the written waiver-of-rights form executed at *that* time which had

not been furnished to appellant pursuant to discovery, and to whose introduction into evidence appellant here objects. It may be noted, parenthetically, that at this latter interrogation the officer testified that Hall told him to "tell Bell in Cincinnati to keep his mouth shut and don't tell the police I shot him, and tell them I was setting on the porch." T. p. 307.

We note initially, in response to this assignment of error, some doubt that the document in question is in fact information subject to disclosure under Crim. R. 16 (B) (1). The waiver form itself, without more, would not appear to be a "*statement* of defendant or co-defendant" under subsection (a), and while it arguably might be a "paper" under subsection (c), it still must be shown to have been "available to or within the possession, custody, or control of the state, and . . . material to the preparation of [the] defense. . . ." Crim. R. 16 (B) (1) (c). Even assuming that the waiver form was otherwise discoverable, we are unable to discern in the record anything which would permit us to conclude the existence of the latter two conditions mandating its discovery.

Thus, we note the unchallenged representation of the prosecutor that the form was not, in fact, in his possession, custody, or control, or even known to him until the officer was called to testify:

> MR. PANIOTO: The case is we never knew we had those. The police had them. We never knew they had them until they just told us now that he had waived his rights.
>
> JUDGE BETTMAN: It was not furnished to defense because you did not know he had it?
>
> MR. PANIOTO: That is correct. We did not know he had it. We knew he had the statement, but not the waiver. T. p. 239.

The appellant had been informed through discovery that the Columbus officer was expected to testify, and had been furnished with the two waiver forms from the previous interrogations by Cincinnati police. Under these circumstances, we cannot conclude that the "paper," assuming it to have been such, was both available to the State and material to the defense, within the meaning of Crim. R. 16 (B) (1) (c); accordingly, we cannot conclude that the court erred in admitting the form into evidence contrary to the rule on discovery and inspection.

Appellant's first assignment of error is therefore overruled.

The final assignment of error with which we are required to deal is stated as follows:

> The Court erred in admitting the defendant's confession without first establishing that the defendant knowingly and intelligently waived his right to silence.

Appellant correctly asserts that the determination of whether a confession is voluntary and whether a waiver of rights has been made willingly and intelligently, is to be made on the basis of the totality of circumstances presented by the record. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). He is further correct in arguing that the issue of whether an effective waiver of rights is made "intelligently" depends, inter alis, upon the possession by the individual of the intellectual ability to understand the meaning and significance of the *Miranda* warnings, and the acuity to decide competently whether or not to waive those rights. Thus, we have no quarrel with the results of *Fikes* v. *Alabama,* 352 U.S. 191 (1957); *Cooper* v. *Griffin,* 455 F. 2d 1142 (5th Cir. 1972) or *U.S. ex rel Lynch* v. *Fay,* 184 F. Supp. 277 (S.D.N.Y. 1960) but rather, find them factually inapposite.

Here, the record reveals neither the oppressive atmosphere of coercion operating on a weak mind which impressed the Court in the *Fikes* case, nor the feeble-mindedness which made an intelligent waiver impossible in the *Cooper* and *Lynch* cases. It is true that while Hall is no model of intellectual capacity, he was found to have an I.Q. within low-normal, or "dull-average" range, and that his thought processes were "relevant and coherent." T. d. 19. It is perhaps useful to excerpt from the unanimous findings of the panel of psychiatrists in their report to the court pursuant to R.C. 2929.03 (D), viz.:

> Prior to seeing Mr. Hall on this occasion, we were given copies of court testimony as well as of psychological workup and psychiatric examination which were performed at Dayton, Ohio, at the Forensic Center there. Essentially, this information corroborated the earlier impressions which we had had — of an individual without psychosis, who was considered to be responsible for himself and his own actions, and was able to participate in his own trial and defense. Subsequently, we did re-examine Mr. Hall in quarters provided by the Hamilton County Jail, and noted that the patient appeared to be a well-developed and, perhaps, somewhat better nourished than on the prior occasion when we saw him. He immediately protested that he was psychiatrically ill — in contradistinction to the prior times that he was seen by us — and indicated that he wanted help with his emotional problems. He professed to be hallucinated — hearing voices and seeing visions and described this as having been present over a period of the last weeks — since his trial.
>
> Despite this, however, he appeared to be in good contact with reality and described again in fairly good detail the events of the murder and the events of the trial as he had witnessed them. It was quite evident that he felt that the threat to his own life — by electrocution — as immanent (sic), and he indicated that he had heard rumors while incarcerated about the

> severity to be expected from the present Governor of Ohio. He again repeated his desires to receive help. Generally, it was the feeling of both of us that this man did not appear to be psychotic nor mentally retarded. It was felt that the previous diagnosis was unchanged. T. d. 48.

Further, the previous diagnosis included a finding that "[h]e gives no evidence which would make one feel that he suffered a mental deficiency or derangement." T. d. 19 at 3.

It is pointed out that Hall came late into the skill of reading, which appears to be true, and it is argued that this casts some doubt on his capacity to waive rights presented in written form. However, the testimony of the officers was that Hall *did* read the forms, did state that he had no questions about them, and did appear to them to understand what he read. It may also be reiterated that in each instance, the *Miranda* warnings were recited *verbally* to Hall, as well as given in writen form. T. p. 248, 286, 305, 382.

We conclude from the totality of circumstances available to us in this lengthy record that the statement was voluntary, that Hall's waiver of rights was given freely and intelligently and that, therefore, no error was committed in admitting the statement into evidence. Appellant's second assignment of error is overruled.

The judgment is accordingly affirmed.

SHANNON, P. J. and COOK, J., concur.

COOK, J. of the Eleventh Appellate District sitting by assignment in the First Appellate District of Ohio.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

SUPREME COURT OF OHIO.

THE STATE OF OHIO,

Appellee,

v.

HALL,

Appellant.

(No. 76-609)

On October 16, 1974, at about 10:00 p.m., Mr. and Mrs. Julius Graber returned to their Park Lane Apartment in Cincinnati from an evening of entertainment at the Music Hall. Mr. Graber drove his 1974 Chevelle Malibu to the front of the apartment building, whereupon Mrs. Graber alighted at the door and entered the building, and proceeded up to their apartment. Graber was last seen driving his automobile down toward the parking garage. About 15 minutes later, Mrs. Graber came back down from her apartment concerned about her husband's whereabouts. The doorman after conversing with her, proceeded to search the parking garage and a lot nearby. Finding neither Graber nor his vehicle, the doorman reported the same to Mrs. Graber who called the Cincinnati Police Department. An officer was dispatched arriving at the apartment at about 10:50 p. m., and after a discussion with Mrs. Graber, initiated a police broadcast for Julius Graber as a missing person.

After Graber dropped his wife off, he pulled his car into the parking garage and proceeded to his allotted space. As he pulled in, a car containing Sam Hall (appellant herein), and Willie Lee Bell stopped behind him preventing him from backing up. Hall got out of this vehicle with a .20 gauge sawed-off shotgun and approached Graber. He then ordered Graber into the trunk of his Chevelle automobile, entered the vehicle and proceeded to drive it out of the garage, Bell following in the other car. They drove to a street adjoining Hall's residence where Bell parked the other car and got behind the wheel of the Graber automobile. As they approached the Spring Grove Cemetery in the Winton Terrace area of Cincinnati, Hall directed Bell to drive into a gravelled surface lane. Bell backed the vehicle about 100 feet into this lane and stopped.

It was now approximately 10:45 p. m., and a Mr. Robert Pierce, Jr., residing in an apartment building across the street from the cemetery, arrived home from work and parked his vehicle in the front lot. His car radio was broadcasting a World Series game, and as he waited for the inning to end, he noticed the Graber vehicle with its parking lights on in the cemetery lane. He heard the sound of car doors close and turned off his radio. He turned around toward the cemetery and heard someone plead, "Don't shoot me, Don't shoot me." He then heard a shot and after a short interval, another shot. Shortly thereafter, the car drove out of the lane and after getting on Groesbeck Road, turned on its lights. Pierce called the police who responded at about 11:04 p. m., and after telling them what he had heard, they went into the cemetery. About 200 feet back, they found Graber lying with the right side of his face in a pool of blood, his right arm at his side and his left arm cocked up by his head. They immediately determined he was alive and called for the Rescue Life

Squad. The ambulance took Graber to the emergency room at General Hospital where he was pronounced dead.

The body was subsequently examined by the county coroner who attributed the cause of death to "lacerations of the brain, causing hemorrhage, due to multiple shotgun wound." A part of his left hand was also shot away, indicating that his hands were crossed behind his head at the time he was executed. Over 70 shotgun pellets were recovered from Graber's head.

Shortly after 9:00 a. m., on the next morning, October 17, 1974, a 1974 Chevelle Malibu pulled into a gas station in Dayton. Two men, Hall and Bell, were in the automobile. They inquired about road work from the attendant and left. Within 15 minutes, they returned, Hall alighting from the vehicle with a sawed-off shotgun. The attendant was ordered into the trunk of his own car, where he was relieved of the station's money. After filling the gas tank of the attendant's car, they left the station with Hall driving the attendant's car and Bell following in Graber's vehicle.

A State Highway Patrolman stopped the attendant's vehicle for a defective exhaust. Hall, immediately upon stopping, got out of the car and walked toward the patrol car announcing that there was a shotgun on the front seat of which he knew nothing. The station attendant saw the patrolman through a hole in the trunk and began pounding on the trunk. The patrolman, after getting him out of the trunk, took Hall to the Montgomery County Jail. Bell in the Chevelle returned to Cincinnati, hiding the car in a vacant building. A citizen spotted the car and reported it to the police. After being impounded, the car was dusted for fingerprints whereupon Hall's fingerprint was lifted from the passenger door.

A shotgun shell was recovered near the spot where Graber's body was found and compared with shells test fired from the shotgun taken from Hall in Dayton. An expert testified that all the shells were fired from the same gun.

While Hall was held in Dayton, he made two statements to Cincinnati police officers and one statement to a Columbus detective.

On November 22, 1974, Hall was indicted by the Hamilton County Grand Jury on two counts of aggravated murder with specifications, on one count of aggravated robbery, and on one count of kidnapping. At his arraignment he entered a plea of not guilty and counsel were appointed to represent him. Counsel immediately filed a demand for discovery pursuant to Crim. R. 16 (A), and entered an additional plea of not guilty by reason of insanity. Thereupon, the court appointed three psychiatrists to inquire into the question of Hall's sanity. The psychiatrists reported their findings accordingly. On January 13, 1975, the court found him sane and capable of standing trial. On January 14, 1975, Hall waived in writing his right to a jury trial and elected to be tried by a three-judge panel.

On January 15, 1975, Hall appeared with his counsel before a three-judge panel for trial, at which time his counsel withdrew his previously entered plea of not guilty by reason of insanity and the cause proceeded to trial. The appellant, Hall, while taking the stand on *voir dire* pursuant to a motion to suppress, did not testify at the trial.

On January 20, 1975, Hall was found guilty of the second count of aggravated murder with the specification of committing the crime while kidnapping, and of the third and fourth counts of the indictment.

A presentence examination was ordered, as was an examination by two psychiatrists pursuant to R. C. 2929.04 (B).

On March 7, 1975, a mitigation hearing was held before the same panel which unanimously concluded that there were not mitigating circumstances and sentenced Hall to die on August 20, 1975, on the charge of aggravated murder and to terms of years on the other charges.

Appeal was taken to the Court of Appeals, and that court affirmed the trial court's judgment.

The cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, and *Mr. Robert R. Hastings, Jr.*, and *Mr. Bruce Garry*, for appellee.

Mr. Clayton E. Shea, for appellant.

Celebrezze, J. At the outset, we can dispose of the appellant's contention that the imposition of the death penalty violates the Eighth and Fourteenth Amendments to the Constitution of the United States, in a succinct manner. Suffice to say, that this argument has been previously resolved by this court in the case of *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and that ruling has been adhered to on a number of occasions. We have carefully examined both the record in this case and the brief in support of appellant's proposition of law characterizing this complaint and we are constrained to say that we find nothing novel therein. Therefore, we shall not consider this argument further.

The appellant then contends that his statements admitted by the trial court should have been suppressed since the state did not meet its burden of establishing that he knowingly, intelligently, and voluntarily waived his *Miranda* rights. Appellant complains further that the statements were inadmissible for the reason that the prosecution did

not furnish the defense with a copy of the waiver of these rights pursuant to their motion for discovery under the Rules of Criminal Procedure.

With respect to the latter contention, the record discloses that the appellant was interviewed on three separate occasions while in custody in Dayton. The first two interviews took place on October 22, 1974, and October 23, 1974, and were conducted by detectives from the Cincinnati Police Department. On October 28, 1974, a detective from the Columbus Police Department interviewed the appellant. Pursuant to the motion for discovery filed by appellant, the prosecutor furnished defense counsel with copies of the "waiver of rights" forms executed by the appellant pertaining to the first two sessions. For whatever reasons — the prosecutor says he did not know the Columbus Police had a "waiver of rights" form for their interrogation — the prosecutor did not comply with the court's order to furnish the third waiver. The appellant maintains that without this written waiver the third statement should not have been admissible. We will not decide here the former contention, but it is obviously not a complete statement of the law.

The first two statements were tape-recorder, the former denying everything and the latter admitting participation in the kidnapping and robbery but not in the homicide. It is the third statement which the appellant characterizes as "crucial" because in this verbal statement the appellant admits his participation in the killing.

Crim. R. 16 (B) (1) (a) (i) allows discovery of statements of the defendant or co-defendant, as follows:

"(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to,

or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

"(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof * * *."

Appellant contends that the signed waiver form was evidence of a voluntary, knowing and intelligent waiver and since it was not furnished pursuant to the allowance of the discovery motion, it should have been excluded by the trial court under Crim. R. 16 (E) (3):

"If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

This exclusion, contends appellant, would have been sufficient grounds for the court to refuse the statement.

Appellee argues that the trial court properly admitted the waiver form because it could not be categorized as "information subject to disclosure." Moreover, appellee states, even if the written waiver was not subject to disclosure, it was properly received because the prosecutor did not have knowledge of its existence until just prior to the time the Columbus detective took the witness stand. Thus, the trial court in the exercise of its discretion could admit such a waiver form. Appellee states further that the appellant was not prejudiced by the admission of this document since defense counsel had already been provided with the other two waiver forms, apparently concluding that since it had complied with two-thirds of the court's order that was sufficient.

The Court of Appeals held that the form was not a "statement of defendant" under Crim. R. 16 (B) (1) (a), but arguably might be a "paper" under sub-paragraph (c) which reads:

"Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belonged to the defendant."

That court apparently accepted the prosecutor's argument that since he had no knowledge of the existence of the "paper," it was not "available to or within the possession, custody, or control of the state * * *."

We conclude that the signed waiver form constituted a "statement of defendant" within the meaning of Crim. R. 16 (B) (1) (a). Although it defies belief that an otherwise competent prosecutor would not be aware of a key document in the custody of an important state's witness, we are prepared to accept the confidence of the trial court in accepting this explanation. It should be noted, however, that the moment the prosecutor became aware of the waiver form he had a continuing duty to disclose such matter to the other party. (Crim. R. 16[D].)

The question to be determined is: "Did the trial court abuse its discretion and commit prejudicial error in admitting the waiver?" The record discloses that defense counsel had already secured two waiver forms and was on notice so as to be prepared to examine the police officers regarding their execution.

Finally, as indicated above, the interrogating officer was capable of testifying to the circumstances surrounding the obtaining of the waiver even if the document itself had been excluded. We conclude that given the totality of the circumstances, the action of the trial court, at most, constituted harmless error. (See *Chapman* v. *California* [1967], 386 U.S. 18.)

Finally, appellant contends that the state did not satisfy its burden of proving that he knowingly, intelligently and voluntarily waived his Fifth Amendment right against self-incrimination. The record discloses two incriminating statements, the one given on October 23, 1974, in which he admitted participating in the kidnapping and robbery and the other on October 28, 1974, where he confessed to participating in the murder.

The United States Supreme Court has held in the case of *Miranda* v. *Arizona* (1966), 384 U.S. 436, that the prosecution must allege and prove the following before a statement made by an accused during a custodial interrogation may be admitted in evidence:

(1) That the accused, prior to any interrogation, was given the *Miranda* warnings;

(2) After receiving said warnings, that the accused made "an express statement" that he intended to waive his rights; and

(3) That the accused effected a voluntary, knowing and intelligent waiver of his rights.

The burden is on the prosecution to prove a valid waiver under the above conditions. (*State* v. *Kassow* [1971], 28 Ohio St. 2d 141.)

Appellant contends that the totality of the circumstances indicate the waiver was not voluntary, knowing or intelligent, because he did not have the intelligence to validly waive his rights. It is the appellant's position that he did

not possess the intellectual ability to comprehend the meaning and significance of the five initial warnings given him or the mental acuity and capacity to competently decide whether to waive his rights. The facts in the record do not support this conclusion. The transcript indicates that prior to each interview by the police, the appellant was fully advised of his constitutional rights. In addition, upon all these occasions the appellant signed a "waiver of rights" form which was shown and read to him before signing. The appellant stated that he could read and each time he was read his rights he responded that he understood them. The record discloses that the appellant responded appropriately to the questions and he appeared to be calm and intelligent. According to the testimony, at no time did the appellant manifest any conduct which could be construed as a misapprehension of his rights. (*State* v. *Jones* [1974], 37 Ohio St. 2d 21.)

The record does not substantiate the appellant's contention that he did not possess sufficient mental capacity to know and understand the explanations given to him or that having understood them he did not voluntarily and knowingly waive them.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

APPENDIX C

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 5. Appeals by leave of court in criminal cases

(A) Motion and notice of appeal. After the expiration of the thirty day period provided by Rule 4 (B) for the

filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(C) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion

for leave to appeal is overruled the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. In the event that the motion is sustained and leave to appeal is granted the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

RULE 12. Determination and judgment on appeal

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO
Art. IV, § 2

§ 2. Supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)